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729-404—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 901

JOHN REINER & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 1a–48a) is reported at 325 F. 2d 438.

JURISDICTION

The judgment of the Court of Claims was entered on December 13, 1963 (Pet. 48a). The petition for a writ of certiorari was filed on March 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the court below erred in holding that upon the government's cancellation of a valid contract for reasons which would have supported a termination for the convenience of the government, without, how-

ever, having invoked the termination-for-convenience clause in the contract, the contractor's recovery should be based upon the termination-for-convenience clause rather than upon principles applicable to a common law breach of contract.

STATEMENT

Petitioner brought this action in the Court of Claims to recover damages for an alleged breach of its contract with the government. The court held that, in the circumstances of this case, the cancellation of the contract by the government was not a common law breach of that contract, and that petitioner's recovery should be limited to the amount payable under the termination-for-convenience-of-the-government clause in the contract. The petition for certiorari raises solely the issue of the correctness of this holding.

In May, 1956 the Department of the Army advertised for bids on 3,567 generator sets. The invitation set forth a desired delivery schedule, but advised the bidder that if he could not make deliveries in accordance therewith, he should set forth his proposed schedule. It then stated that "[b]ids offering a proposed delivery schedule which will extend the time for delivery of the quantities as called for in any delivery period of the foregoing delivery schedule by more than 60 days, may be cause for rejection of bid" (Pet. 16a–17a).

Petitioner submitted a bid specifying delivery dates more than 60 days after the dates listed by the government in the invitation (Pet. 26a). When the bids

were opened, petitioner's was the lowest in price of 13 bidders. After the requisitioning agency determined that petitioner's proposed delivery schedule would meet its requirements, petitioner was notified by telephone on June 29, 1956, that its bid had been accepted. This was followed by written notice of award received on July 2, 1956, and a formal contract was executed shortly thereafter (Pet. 2a, 27a).

Petitioner then proceeded to negotiate with suppliers and to incur certain limited costs under the contract (Pet. 2a, 41a–42a). On August 3, 1956, petitioner was advised by the contracting officer to suspend all operations under the contract until further notice, and to inform its suppliers and subcontractors accordingly. This instruction was based upon a ruling made by the General Accounting Office, after a protest by an unsuccessful bidder, that the award was improper and the contract should be cancelled (Pet. 2a, 27a–28a). That Office had concluded that "the award as made does violence to the spirit and purpose of the law due to the fact that the bidders were not properly advised as to the basis upon which bids should have been submitted. Hence, the contract should be cancelled" (Pet. 32a–33a).

Unsuccessfully, petitioner sought a reversal of the Comptroller General's decision; and on September 21, 1956, the contracting officer advised petitioner that, in compliance with the ruling, its contract was cancelled (Pet. 33a). Petitioner replied that the decision of the Comptroller General was not binding upon the Army; that it considered the cancellation a

breach of the contract; and that it would seek recovery of full damages (Pet. 41a).

The contract clause entitled "Termination for Convenience of the Government" provided, *inter alia*, that "performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government" (Pet. 18a). The contracting officer did not invoke this clause in cancelling the contract.

The court below (one judge dissenting) held, first, that the award to petitioner must be deemed lawful, not void (Pet. 7a); and, second, that, in the circumstances of this case, the cancellation should be considered a termination for the convenience of the government with petitioner's recovery limited accordingly, upon the authority of this Court's decision in *College Point Boat Corp.* v. *United States*, 267 U.S. 12.

ARGUMENT

The decision of the court below, while not unimportant, is plainly correct. There being no conflict, further review by this Court is not warranted.

1. Central to the decision of the Court of Claims is the fact that this contract was cancelled for reasons which would clearly support a termination for convenience as being "in the best interests of the Government." The termination-for-convenience clause, in effect, confers a right to terminate at will, saving an exercise in bad faith or a clear abuse of discretion.

Petitioner's contention that the clause reaches only situations where the procurement is no longer necessary (Pet. 15–16) finds support neither in the language of the clause nor in judicial interpretation. While it is true, of course, that no contractual authority is needed to set aside an illegal contract, it does not follow, as petitioner maintains (Pet. 16), that the provision is inoperative when the affected agency disagrees with the Comptroller General's ruling of improper award. For, it obviously may be in the "best interests" of the government that the contracting officer avoid unseemly conflict and accommodate himself to the Comptroller General's opinion as a matter of policy.

2. The foregoing circumstances bring this case within the ambit of this Court's decision in *College Point Boat Corp.* v. *United States*, 267 U.S. 12. In *College Point Boat* the Navy, in effect, cancelled the contract by stopping the work and seeking a basis for settlement, without benefit of any right of termination reserved in the contract, and without knowledge that it had such authority under statute. There, as here, the department "failed to give the notice requisite to terminate the contract" (267 U.S. at 15). The stoppage of the work appeared to be an anticipatory breach; but the Court upheld the subsequent assertion of the right of termination and held that the contractor could recover only the limited damages afforded by the statute. Failure to invoke the provision at the time of termination was held unimportant (267 U.S. at 15–16):

> A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later. [Footnotes omitted.]

In the present case, no less than in *College Point Boat*, the "adequate cause" for termination existed in the broad termination-for-convenience clause; it could be asserted as a defense in petitioner's action for breach; and it "operated to curtail the damages recoverable" (*id.* at 16) to those authorized by the termination clause. Nor do the procedural irregularities dictate a different result. As the court below said: "Just as the failure to invoke the termination article leaves untouched the [government's] right to rely on the damage limitation of that clause, so the failure to follow the termination procedures of [procurement regulations] is ineffective to broaden [petitioner's] rights of recovery," since petitioner neither claimed, nor was there reason to believe, that it was injured by the informal procedures followed (Pet. 11a). Cf. *J. W. Bateson Co., Inc.* v. *United States*, 308 F. 2d 510, 514 (C.A. 5).

3. Petitioner's attempt (Pet. 6-9) to portray the present decision as in conflict with the court's earlier decision in *Klein* v. *United States*, 285 F. 2d 778, 152 Ct. Cl. 8, is unavailing. On the contrary, the opinion

below expressly reconciles the two cases (Pet. 10a–11a) and the distinction is emphasized by the decision of *Goldwasser* v. *United States*, 325 F. 2d 722 (Ct. Cl.) (Pet. 49a–65a), re-affirming the *Klein* holding, and *Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (Ct. Cl.) (Pet. 66a–73a), re-affirming the instant case, on the same day.

Klein and *Goldwasser* merely announce the rule for cases in which the government erroneously cancels for asserted *default*. In that situation, the government is not permitted to terminate the contract retroactively for the "convenience of the Government." The instant case and *Brown & Son*, on the other hand, hold that the government is not barred from invoking the convenience clause when the contracting officer terminates the contract in deference to a ruling of illegality by the Comptroller General.[1] It seems clear the two rules are compatible. With one exception, the judges of the Court of Claims have unambiguously considered and rejected the contention that the decisions mentioned are in conflict. There is accordingly, no occasion for this Court to intervene.

[1] See Judge Whitaker's dissents in the instant case (Pet. 14a–15a) and in *Brown & Son* (Pet. 73a). Chief Judge Jones (Pet. 56a–63a) and Judge Davis (Pet. 64a–65a) dissented in *Goldwasser*, but on a differing view of the facts, and the latter expressly accepts the *Klein* rule (Pet. 64a).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
KATHRYN H. BALDWIN,
Attorneys.

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